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Recommended Citation

Barbara J. Fick, *Negotiation Theory and the Law of Collective Bargaining*, 38 U. Kan. L. Rev. 81 (1989-1990).

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Negotiation Theory and the Law of Collective Bargaining

Barbara J. Fick*

In recent years there has been much written, both prescriptive and descriptive, on the negotiation process.¹ Little of this literature has integrated the vast body of negotiation law as it has developed over the past fifty years under the National Labor Relations Act²

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1. See, e.g., G. BELLOW & B. MOULTON, *THE LAWYERING PROCESS: NEGOTIATION* (1981); H. COHEN, *YOU CAN NEGOTIATE ANYTHING* (1980); C. CRAVER, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT* (1986); M. DEUTSCH, *THE RESOLUTION OF CONFLICT* (1973); H. EDWARDS & J. WHITE, *THE LAWYER AS A NEGOTIATOR* (1977); R. FISHER & W. URY, *GETTING TO YES* (1981); R. FISHER & S. BROWN, *GETTING TOGETHER* (1988); P. GULLIVER, *DISPUTES AND NEGOTIATIONS: A CROSS-CULTURAL PERSPECTIVE* (1979); J. ILICH, *THE ART AND SKILL OF SUCCESSFUL NEGOTIATION* (1973); C. KARRASS, *GIVE & TAKE: THE COMPLETE GUIDE TO NEGOTIATING STRATEGIES AND TACTICS* (1974) [hereinafter *GIVE & TAKE*]; C. KARRASS, *THE NEGOTIATING GAME* (1970); D. LAX & J. SEBENIUS, *THE MANAGER AS NEGOTIATOR* (1986); R. LEWICKI & J. LITTERER, *NEGOTIATION* (1985); *NEGOTIATIONS: SOCIAL-PSYCHOLOGICAL PERSPECTIVES* (D. Druckman ed. 1977) [hereinafter *NEGOTIATIONS*]; G. NIERENBERG, *THE COMPLETE NEGOTIATOR* (1986); G. NIERENBERG, *FUNDAMENTALS OF NEGOTIATING* (1973) [hereinafter *FUNDAMENTALS*]; D. PRUITT, *NEGOTIATION BEHAVIOR* (1981); D. PRUITT & J. RUBIN, *SOCIAL CONFLICT: ESCALATION, STALEMATE AND SETTLEMENT* (1986); H. RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* (1982); J. RUBIN & B. BROWN, *THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION* (1975); G. SHEA, *CREATIVE NEGOTIATION* (1983); J. WALL, *NEGOTIATION: THEORY AND PRACTICE* (1985); R. WENKE, *THE ART OF NEGOTIATION FOR LAWYERS* (1985); G. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* (1983); I. ZARTMAN & M. BERMAN, *THE PRACTICAL NEGOTIATOR* (1982); I. ZARTMAN, *THE NEGOTIATION PROCESS: THEORIES AND APPLICATIONS* (1978); Condlin, "Cases on Both Sides": *Patterns of Argument in Legal Dispute Negotiation*, 44 MD. L. REV. 65 (1985); Dunlop, *The Negotiations Alternative in Dispute Resolution*, 29 VILL. L. REV. 1421 (1984); Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976); Fisher, *Negotiating Power: Getting and Using Influence*, 27 AM. BEHAV. SCIENTIST 149 (1983); Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST. L.J. 41 (1985); Gulliver, *Negotiations as a Mode of Dispute Settlement: Towards a General Model*, 7 LAW & SOC'Y REV. 667 (1973); Hartje, *Lawyer's Skills in Negotiations: Justice in Unseen Hands*, 1984 MO. J. DISPUTE RESOLUTION 119; Lowenthal, *A General Theory of Negotiation Process, Strategy, and Behavior*, 31 KAN. L. REV. 69 (1982); Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984); Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979); Schelling, *An Essay on Bargaining*, 46 AM. ECON. REV. 281 (1956).

2. 29 U.S.C. §§ 151-69 (1982 & Supp. V 1987). The NLRA regulates the relationship between private-sector employers and their employees and union representatives.

(hereinafter NLRA), with negotiation theory.³ Collective bargaining under the NLRA has some peculiarities not readily transferable to negotiation across-the-board; there are enough similarities, however, that a consideration of the law of collective bargaining can provide some valuable insights and lessons on negotiation theory and process.

The study of negotiation involves either the substance of the negotiation (the issues to be discussed and resolved), or the negotiation procedure (the tactics and strategies used by the parties in discussing and resolving the issues). The NLRA regulates both aspects of collective bargaining to some degree.

Section 8(d) of the NLRA lists those issues on which labor and management must bargain (the substance of negotiation): "wages, hours, and other terms and conditions of employment."⁴ The National Labor Relations Board (hereinafter the NLRB or Board) and the courts have given content and meaning to that phrase by specifying particular issues over which the parties must bargain.⁵ Further, the NLRA requires the parties to engage in "collective bargaining" (the process of negotiation) over these enumerated substantive issues.⁶

The NLRA is also concerned with negotiation procedure. Collective bargaining "involves more than the holding of conferences and the exchange of pleasantries."⁷ The Board and the courts have recognized that, to be effective, bargaining requires adherence to

3. An exception is the classic work by Carl Stevens, *STRATEGY AND COLLECTIVE BARGAINING NEGOTIATION* (1963), in which the author describes the legal limits of collective bargaining and then examines the parties' development of strategy within those limits.

4. 29 U.S.C. § 158(d) (1982).

5. See, e.g., *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981); *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964); *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958); *NLRB v. Niles-Bement-Pond Co.*, 199 F.2d 713 (2d Cir. 1952) (bonus payments); *W.W. Cross & Co. v. NLRB*, 174 F.2d 875 (1st Cir. 1949) (health insurance); *Great S. Trucking Co. v. NLRB*, 127 F.2d 180 (4th Cir.), *cert. denied*, 317 U.S. 652 (1942) (vacations); *Schrafft's Candy Co.*, 244 N.L.R.B. 581 (1979) (plant rules); *Smith Cabinet Mfg. Co.*, 147 N.L.R.B. 1506 (1964) (shift differential payments); *Braswell Motor Freight Lines*, 141 N.L.R.B. 1154 (1963), *enforced per curiam sub nom. Teamsters Local Union 745 v. NLRB*, 370 F.2d 226 (D.C. Cir. 1966) (overtime payments); *Inland Steel Co.*, 77 N.L.R.B. 1, *enforced*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949) (pensions).

6. 29 U.S.C. §§ 158(a)(5), -(b)(3) (1982).

7. *Connecticut Coke Co.*, No. 265, Decisions of the Nat'l Labor Bd. pt. 2 at 88, 89 (1934). This is a pre-NLRB decision issued by the National Labor Board that was responsible for administering § 7(a) of the National Industrial Recovery Act of 1933. This section gave employees the right "to organize and bargain collectively through representatives of their own choosing," similar to the right conferred under the NLRA. National Industrial Recovery Act of 1933, ch. 90, § 7(a), 48 Stat. 195, 198.

certain procedural standards.⁸ The development of these procedural principles provides useful guidance in defining the process and elements essential not only to labor relations, but to negotiation in general.

This Article focuses on the procedural aspects developed under the NLRA in defining the concept of collective bargaining and discusses their applicability to a general theory of negotiation.

I. THE STATUTORY DUTY TO BARGAIN IN GOOD FAITH

In passing the NLRA in 1935,⁹ Congress protected employees' rights to form and join labor organizations for the purpose of collective bargaining with their employers;¹⁰ moreover, Congress imposed on employers the duty "to bargain collectively with the representatives of [their] employees."¹¹ As a result, an entire body of law has developed around the concept of collective bargaining. The NLRA is the only statute that systematically and comprehensively regulates the negotiation process¹² by providing legal guidance for determining the structure of negotiation.¹³ The NLRA imposes specific requirements on the negotiators, and proscribes specific types of behavior.

As initially enacted, the NLRA did not contain a definition of the term collective bargaining. As recognized by the Board in its

8. See generally Duvin, *The Duty to Bargain: Law in Search of Policy*, 64 COLUM. L. REV. 248 (1964); Fleming, *The Obligation to Bargain in Good Faith*, 47 VA. L. REV. 988 (1961); Gross, Cullen & Hanslowe, *Good Faith in Labor Negotiations: Tests and Remedies*, 53 CORNELL L. REV. 1009 (1968).

9. National Labor Relations Act, ch. 372, § 1, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151-69 (1982)).

10. "Employees shall have the right to self-organization, to form, to join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." *Id.*, § 7, 49 Stat. 452 (codified at 29 U.S.C. § 157).

11. *Id.* § 8(5), 49 Stat. 453 (codified at 29 U.S.C. § 158(a)(5)).

12. There are some other areas in the law where certain aspects of negotiation are regulated. For example, securities law prohibits untrue statements of material fact and mandates disclosure of material facts necessary to preclude misrepresentation in the purchase and sale of securities. 17 C.F.R. § 240.10(b)(5) (1987). See also 10 U.S.C. §§ 2304(a), -(g), 2306(a), (f), 2311 (1982) (disclosure requirements for procurement contracts); 15 U.S.C. §§ 1701-1720 (1982) (interstate sale of land contracts). These legal restraints are mainly aimed at preventing fraud, however, and do not concern the process of negotiation itself.

13. Much of the literature discussing negotiation theory and structure is grounded in the social sciences. See, e.g., *THE DISPUTING PROCESS - LAW IN TEN SOCIETIES* (L. Nader & H. Todd ed. 1978); E. GOFFMAN, *STRATEGIC INTERACTION* (1969); *NEGOTIATIONS*, *supra* note 1; J. RUBIN & B. BROWN, *supra* note 1; J. VON NEUMAN & O. MORGENSTERN, *THEORY OF GAMES AND ECONOMIC BEHAVIOR* (1944). An examination of the NLRA provides a legal perspective on the negotiation process.

first Annual Report, however, "Collective bargaining is something more than the mere meeting of an employer with the representative of his employees; the essential thing is rather the serious intent to adjust differences and to reach an acceptable common ground."¹⁴ Thus, the bargainer's subjective intent, which must be inferred from circumstantial evidence, is key to determining whether the bargaining obligation has been fulfilled. The Board considers the totality of the circumstances surrounding the negotiators' behavior at the bargaining table as indicative of their subjective good faith intent to reach agreement.¹⁵ The factors considered in evaluating the totality of the circumstances include statements made by the negotiator, bargaining history, the proposals presented, willingness to grant concessions, and justifications for rejecting proposals presented by the other party.¹⁶ The Board, in evaluating these factors, attempts to determine whether a negotiator "went through the motions of negotiation as an elaborate pretense with no sincere desire to reach an agreement if possible, or that it bargained in good faith but was unable to arrive at an acceptable agreement"¹⁷

Much of this evaluation requires an analysis of the terms discussed during bargaining. For instance, proposing and insisting upon terms predictably unacceptable to the other party¹⁸ or failing to find anything acceptable in an ordinary labor contract¹⁹ can evidence intent not to reach agreement. This type of evaluation is labor law specific, and therefore requires a knowledge of terms a union or employer would consider acceptable or outrageous, as well as some familiarity with the content of standard labor contracts.

Apart from the issue of the parties' subjective intent, the Board also developed required procedural guidelines to establish condi-

14. 1 NLRB ANN. REP. 85 (1936).

15. *E.g.*, NLRB v. Texas Coca-Cola Bottling Co., 365 F.2d 321, 322 (5th Cir. 1966); Skrl Die Casting, 245 N.L.R.B. 1041, 1049 (1979), *modified on other grounds*, 651 F.2d 1218 (6th Cir. 1981); Tomco Communications, 220 N.L.R.B. 636, 637 (1975), *enforcement denied on other grounds*, 567 F.2d 871 (9th Cir. 1978).

16. *E.g.*, Southside Elec. Coop., 247 N.L.R.B. 705, 707-08 (1980); Collins & Aikman Corp., 165 N.L.R.B. 678 (1967), *enforced*, 395 F.2d 277 (4th Cir. 1968); McCulloch Corp., 132 N.L.R.B. 201, 215-16 (1961); Marden Mfg. Co., 106 N.L.R.B. 1335, 1338 (1953), *modified on other grounds*, 217 F.2d 567 (5th Cir. 1954), *cert. denied*, 348 U.S. 981 (1955).

17. NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 134 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953).

18. *E.g.*, Proctor & Gamble Mfg. Co., 160 N.L.R.B. 334, 338 (1966); "M" System, Inc., 129 N.L.R.B. 527, 547 (1960).

19. *Reed & Prince*, 205 F.2d at 134.

tions conducive to reaching agreement.²⁰ Failure to abide by these bargaining procedures impedes the bargaining process and constitutes a repudiation of the basic concept of bargaining. Unlike the Board's substantive evaluations, these procedural guidelines are not labor law specific but rather relate to the fundamental principles of the negotiation process. The remainder of this Article will focus on these guidelines.

Subsequently, Congress' amendment of the NLRA in 1947²¹ defined collective bargaining to include several procedural requirements in addition to explicitly imposing a "good faith" test. Section 8(d) of the NLRA defines collective bargaining as follows:

the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession²²

The procedural requirements listed, such as the duty to meet at reasonable times and to execute a written contract incorporating any agreement reached, have not been viewed as exhaustive or exclusive. Rather, the Board and the courts have built upon this foundation in formulating procedural rules designed to facilitate the process of collective bargaining.

Thus, in trying to give content to the concept of bargaining, the Board and the courts have developed both contextual indicia of the subjective good faith of the bargainers and procedural criteria for the essential elements of the bargaining process. "Good-faith bargaining thus involves both a procedure for meeting and negotiating, which may be called the externals of collective bargaining, and a bona fide intention, the presence or absence of which must be discerned from the record."²³

20. *E.g.*, *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61 (3d Cir. 1965) ("Merely meeting and conferring without a prior exchange of requested data, where such is relevant, does not facilitate *effective* collective bargaining and, therefore, . . . a refusal to furnish data is an unfair labor practice notwithstanding the good faith of the employer in rejecting the request." *Id.* at 68); *B.F. Diamond Constr. Co.*, 163 N.L.R.B. 161 (1967), *enforced per curiam*, 410 F.2d 462 (5th Cir.), *cert. denied*, 396 U.S. 835 (1969) ("Wholly apart from any consideration of Respondents' intent, the evidence reveals that Respondents did not display the degree of diligence [in scheduling meetings] the proper performance of its bargaining obligations required." *B.F. Diamond*, 163 N.L.R.B. at 175.).

21. Act of June 23, 1947, ch. 120, § 1, 61 Stat. 136 (1947) (codified at 29 U.S.C. §§ 141-197 (1982)).

22. 29 U.S.C. § 158(d) (1982).

23. *General Elec. Co.*, 150 N.L.R.B. 192, 194 (1964), *enforced*, 418 F.2d 736 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970).

It is important to emphasize that failure to reach an agreement is not an indicator of lack of good faith. The NLRA explicitly recognizes that parties may negotiate in complete good faith yet may be unable to agree to a proposal or concede their positions.²⁴ The procedural criteria imposed by the NLRA are designed to help the negotiation process work effectively and to ensure that the parties are interested in reaching an agreement; they will not, however, guarantee that an agreement is reached.²⁵

A consideration of these procedural criteria, considered essential for good-faith bargaining in labor law, can be useful for developing a theory concerning behavior necessary for any effective negotiation to occur.

II. LAW AND THEORY: LEGAL DEVELOPMENTS AND THEORETICAL SUPPORT

A. *To Meet at Reasonable Times*

The statutory admonition "to meet at reasonable times"²⁶ encompasses two distinct procedural criteria—the concepts of method and time.

Parties may negotiate by three basic methods: in person, by telephone, and by written correspondence. In the course of any single negotiation, all three methods may be utilized to bargain and to reach agreement. The statutorily preferred method, however, is "to meet," which has been interpreted as requiring in-person negotiation.²⁷

"It is elemental that collective bargaining is most effectively carried out by personal meetings and conferences of parties at the bargaining table,"²⁸ and the requirements of section 8(d) are "not satisfied by merely inviting the union to submit any proposition

24. The obligation to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession" 29 U.S.C. § 158(d) (1982).

25. "Discussion conducted under that standard of good faith may narrow the issues, making the real demands of the parties clearer to each other, and perhaps to themselves, and may encourage an attitude of settlement through give and take." NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 488 (1960). Still, "[t]he Act does not compel any agreement whatsoever" NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 402 (1952).

26. 29 U.S.C. § 158(d) (1982).

27. *E.g.*, Fountain Lodge, Inc., 269 N.L.R.B. 674, 675 (1984); Alle Arecibo Corp., 264 N.L.R.B. 1267, 1273 (1982); Case, Inc., 237 N.L.R.B. 798, 814 (1978), *modified*, 653 F.2d 1091 (6th Cir. 1981); Rasco Olympia, Inc., 185 N.L.R.B. 894, 897 (1970).

28. United States Cold Storage Corp., 96 N.L.R.B. 1108, 1108 (1951), *enforced*, 203 F.2d 924 (5th Cir.), *cert. denied*, 346 U.S. 818 (1953).

they may have in writing where either party seeks a personal conference."²⁹ Neither the NLRA nor case law prohibits the use of the other methods; it is recognized, however, that bargaining by telephone or mail is not as effective as face-to-face negotiation.

The inherent delay in written correspondence can frustrate rather than facilitate agreement. Although the telephone allows immediate verbal communication and response, the possibility of exchanging written documents and proposals is hindered. Negotiation in person, on the other hand, constitutes the optimal method for effectuating both communication and agreement. The parties can react to nonverbal as well as verbal signals, and they can share and exchange written documentation.

The superiority of communication in person as a negotiation method is also acknowledged by writers outside the field of labor law. In the 17th century, Sir Francis Bacon considered the issue of communication methods used in the negotiation process in his essay "Of Negotiating."³⁰

It is generally better to deale by Speech, then by Letter; And by the Mediation of a Third, then by a Mans Selfe. Letters are good, when a Man would draw an Answer by Letter backe againe; Or when it may serve, for a Mans Iustification, afterwards to produce his owne Letter; Or where it may be Danger to be interrupted, or heard by Peeces. To deale in Person is good, when a Mans Face breedeth Regard, as Commonly with Inferiours; Or in Tender Cases, where a Mans Eye, upon the Countenance of him with whom he speaketh, may give him a Direction, how farre to goe: And generally, where a Man will reserve to himselfe Libertie, either to Disavow, or to Expound.³¹

This early recognition of the importance of nonverbal clues in giving meaning to communication and thereby facilitating negotiation continues to be emphasized. Erving Goffman's classic work *Strategic Interaction* discusses the concept of "framing" communication.³² The content of a message is not merely the words used (their semantic character), but also the way the words are conveyed (their expressive character). Paralinguistic clues such as facial expression, intonation, and gestures, which are observable in face-to-face interaction, provide a "frame" for the communication that adds meaning to the words used.³³

29. NLRB v. United States Cold Storage Corp., 203 F.2d 924, 928 (5th Cir. 1953), *enforcing*, 96 N.L.R.B. 1108 (1951), *cert. denied*, 346 U.S. 818 (1953).

30. F. BACON, *Of Negotiating*, in BACON'S ESSAYS AND COLOURS OF GOOD AND EVIL 195 (rev. reprint 1972) (1862).

31. *Id.*

32. E. GOFFMAN, *supra* note 13, at 7-9.

33. *Id.* See also D. TANNEN, *THAT'S NOT WHAT I MEANT!* 82-100 (1986) (discussing the concept of framing—how it works and how it affects communication).

Clarity of communication is an important element of negotiation. Parties desirous of reaching agreement will select the method of communication most likely to create clarity. Accordingly, labor law holds that the willingness to engage in face-to-face negotiation is a requirement for good-faith bargaining.³⁴

The NLRA requires not only that the parties meet in person, but also that they meet "at reasonable times."³⁵ This time component refers to the duration of meetings as well as to their frequency.³⁶ What is reasonable will depend on the peculiarities of each negotiation.³⁷ A negotiation involving a substantial number of complex issues would reasonably require more meetings of longer duration than a simple single-issue transaction.

The principle underlying the time requirement is that where the parties are sincerely interested in attempting to reach an agreement, they will meet often enough, and allow enough time to explore the issues fully and to discuss their respective interests and proposals. "Agreement is stifled at its source if opportunity is not accorded for discussion or so delayed as to invite or prolong unrest or suspicion."³⁸

The use of time as a tactic in the negotiation process is well documented.³⁹ Most of the literature considers the effect of deadlines on negotiation. Studies show that deadlines increase the pressure to reach an agreement, thereby lessening the bargainers' demands and increasing their concession rates.⁴⁰ Because of this

34. "That bargaining principals are entitled to face-to-face negotiations with their opposites is, I believe, an elementary and essential condition of bona fide bargaining" Aaron Newman, 144 N.L.R.B. 1582, 1589 (1963).

35. 29 U.S.C. § 158(d) (1982).

36. Waycross Sportswear, Inc., 166 N.L.R.B. 101, 107-08 (1967), *enforced*, 403 F.2d 832 (5th Cir. 1968); Beverage-Air Co., 164 N.L.R.B. 1127, 1138-39 (1967), *enforced in pertinent part*, 402 F.2d 411 (4th Cir. 1968).

37. See, e.g., B.F. Diamond Constr. Co., 163 N.L.R.B. 161, 174-75 (1967), *enforced per curiam*, 410 F.2d 462 (5th Cir.), *cert. denied*, 396 U.S. 835 (1969); Little Rock Downtowner, Inc., 145 N.L.R.B. 1286, 1305-07 (1964), *enforced in pertinent part*, 341 F.2d 1020 (8th Cir. 1965); Radiator Specialty Co., 143 N.L.R.B. 350, 368 (1963), *enforced in part*, 336 F.2d 495 (4th Cir. 1964).

38. J.H. Rutter-Rex Mfg. Co., 86 N.L.R.B. 470, 506 (1949). See also Brown, De-Androde, Hurvich, McDaritt, Shortell, Slichter, Stanton, Ulrich & Wall, *Report to the Governor of Massachusetts on Labor-Management Relations*, 1 INDUS. & LAB. REL. REV. 110 (1947) [hereinafter *Report to the Governor*], ("Stalling by one side or another gives rise to antagonisms." *Id.* at 112.).

39. GIVE & TAKE, *supra* note 1, at 44-46; R. LEWICKI & J. LITTERER, *supra* note 1, at 151-55; D. PRUITT, *supra* note 1, at 46-55, 73-74; H. RAIFFA, *supra* note 1, at 78-85; J. RUBIN & B. BROWN, *supra* note 1, at 120-24; J. WALL, *supra* note 1, at 117.

40. See J. RUBIN & B. BROWN, *supra* note 1, at 120-24; C. STEVENS, *supra* note 3, at 45-52; Pruitt & Drews, *The Effect of Time Pressure, Time Elapsed, and the Opponent's Concession Rate on Behavior in Negotiation*, 5 J. EXPERIMENTAL SOC. PSYCHOLOGY 43 (1969).

deadline effect, parties commonly may begin bargaining months in advance of a contract expiration deadline and meet with reasonable frequency for reasonable duration, yet they will not reach agreement until the deadline approaches.

It is not the deadline effect alone, however, that produces agreement in such cases. The frequency and duration of meetings preceding the deadline allow the parties to make exploratory offers and proposals and to exchange or obtain information for evaluating offers. When the deadline approaches, the parties are then in a position to announce their final concessions and to evaluate the credibility of the respective announcements.⁴¹ A deadline alone, without the precedent time to negotiate, will cause an exchange of take-it-or-leave-it offers just as likely to produce a breakdown in negotiation as an agreement.⁴² Thus, a requirement that bargainers meet reasonably frequently and for periods of time reasonably necessary to discuss and explore the issues involved enhances the prospect that agreement will be reached when the deadline arrives.

B. The Authority of the Negotiator

Most negotiations carried on in the legal arena are conducted by agents on behalf of principals. In labor relations, the union business agent negotiates for the membership of the local union while the plant manager negotiates for the company. When settling a lawsuit, lawyers negotiate on behalf of their respective clients. Those engaged in the actual give-and-take of the negotiation process are usually not acting on their own behalf, but in the interests of an absent, or at least nonparticipating, third party. As in any principal-agent relationship, questions arise concerning the extent of the agent's authority to act on behalf of, and to legally bind, the principal.⁴³

A principal can generally vest his negotiating agent with three levels of authority: no authority, limited authority, and complete authority. In the first situation, the agent acts as an intermediary or messenger, transmitting proposals to and from the principal with no ability to independently agree to, or propose, any terms. An agent with limited authority has the ability to exchange proposals, make concessions, and agree to terms within a bargaining

41. See J. Rubin & B. Brown, *supra* note 1, at 123-24; C. STEVENS, *supra* note 3, at 98-107; Kelley, *A Classroom Study of the Dilemmas in Interpersonal Negotiations*, in STRATEGIC INTERACTION AND CONFLICT 49 (K. Archibald ed. 1966).

42. See *infra* notes 51-63 and accompanying text (discussion on Boulwareism).

43. See generally RESTATEMENT (SECOND) OF AGENCY §§ 32-81 (1958) (discussion of agent authority).

range set by the principal and subject to the principal's final ratification. An agent with complete authority has the power to bind the principal to whatever agreement the agent negotiates. Although all three types of agency-principal authority relationships are legally cognizable, they are not equally appropriate for use in good-faith negotiations.

"The bargaining process which the [NLRA] envisages . . . contemplates its exercise by agents clothed with sufficient authority to expedite consummation."⁴⁴ By refusing to vest an agent with authority, the principal prevents any meaningful discussion from occurring during the bargaining process. The agent cannot be persuaded to take any action with respect to the proposals presented by the other party. The exchange of concessions, an important element of the negotiation process, is thus inhibited. Using an agent without authority is an obstacle to effective bargaining. In essence, the other party is denied the opportunity for face-to-face negotiations, as the agent is little more than a human mail box. "Bargaining connotes a meeting between equals and neither party discharges the obligations imposed upon him by statute by merely providing an ear to which demands, requests or suggestions can be made."⁴⁵

Although the NLRA does not mandate that the bargaining agent be given complete authority to negotiate, it does view an agent who lacks any authority to make an agreement as an indicator of bad faith on the part of the principal. The lack of any authority is an impediment to bargaining and therefore indicative of both bad faith and an intent not to reach an agreement.⁴⁶

Negotiator's authority and the futility of dealing with an agent with no authority are discussed in the negotiation literature.⁴⁷ Most

44. *Standard Generator Serv. Co.*, 90 N.L.R.B. 790, 800 (1950), *enforced*, 186 F.2d 606 (8th Cir. 1951).

45. *Lloyd A. Fry Roofing Co.*, 106 N.L.R.B. 200, 205 (1953), *modified and enforced*, 216 F.2d 273 (9th Cir. 1954), 220 F.2d 432 (9th Cir. 1955).

46. *See, e.g.*, *S-B Mfg. Co.*, 270 N.L.R.B. 485, 492 (1984); *Bedford Farmers Coop.*, 259 N.L.R.B. 1226, 1228 (1982); *Byrd's Terrazzo & Tile Co.*, 227 N.L.R.B. 866, 870 (1977); *Manor Mining & Contracting Co.*, 197 N.L.R.B. 1057, 1059 (1972), *enforced*, 83 L.R.R.M. (BNA) 2409 (3rd Cir. 1973); *Jeffrey Stone Co.*, 173 N.L.R.B. 11, 15 (1968); *M.F.A. Milling Co.*, 170 N.L.R.B. 1079, 1097 (1968), *enforced sub nom. Local Union 676 v. NLRB*, 463 F.2d 953 (D.C. Cir. 1972); *Billups W. Petroleum Co.*, 169 N.L.R.B. 964, 970-71 (1968), *enforced per curiam*, 416 F.2d 1333 (5th Cir. 1969); *National Amusements, Inc.*, 155 N.L.R.B. 1200, 1206-07 (1965); *see also Report to the Governor, supra* note 38, at 111.

47. *See, e.g.*, N. JACKER, *EFFECTIVE NEGOTIATION TECHNIQUES FOR LAWYERS* 15-20; C. KARRASS, *supra* note 1, at 74-75, 96-99; R. LEWICKI & J. LITTERER, *supra* note 1, at 224-25; *FUNDAMENTALS, supra* note 1, at 171-74; R. WENKE, *supra* note 1, at 6-7.

writers view complete authority as inadvisable, as it can cause a negotiator to be cornered into giving an immediate response, thereby losing the opportunity to reflect carefully on the proposals made.⁴⁸ On the other hand, using an agent with no authority allows a principal to gather information from the other side without any correlative disclosure.⁴⁹ Such a tactic constitutes discovery, not negotiation. The frustration of dealing with an agent with no authority can cause the other party to break off the negotiation. "[I]f a negotiator is limited in the concessions he/she can make, the very idea of negotiation is undermined. When negotiation is understood as the process of making concessions toward mutual agreement, encountering an opponent who cannot make concessions violates expectations and creates anger."⁵⁰

If parties are sincerely interested in reaching a mutually acceptable agreement, they will vest their bargaining agents with sufficient authority to effectuate the negotiation process by engaging in a full discussion and exchange of ideas and proposals necessary for reaching agreement.

C. *Boulwareism, or "Take-it-or-Leave-it" Bargaining*

In 1947, Lemuel Boulware, a vice president at General Electric (GE), devised a negotiation strategy for dealing with the unions that represented certain groups of GE employees.⁵¹ This strategy involved an initial extensive market research program to determine the needs and wants of the employees, as well as the business conditions, economic trends, and competitive factors shaping the marketplace. Based on the information obtained, GE decided what were "fair" employment terms to offer its employees, considering both the employees' interests and its own, and presented this offer to the unions as its firm and final offer. GE refused to modify this offer in response to union arguments, threats, or counter-offers. The only basis for modification was if the union could show that the facts on which GE's offer was based were somehow incorrect or inaccurate. This firm, final offer aspect of Boulware's

48. N. JACKER, *supra* note 47, at 15-16; GIVE & TAKE, *supra* note 1, at 74-75; R. WENKE, *supra* note 1, at 6.

49. N. JACKER, *supra* note 47, at 16-17.

50. R. LEWICKI & J. LITTERER, *supra* note 1, at 225.

51. The description of Boulwareism is derived from the following sources: General Elec. Co., 150 N.L.R.B. 192, 207 (1964), *enforced*, 418 F.2d 736 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970); GENERAL ELECTRIC COMPANY, THE STORY OF GENERAL ELECTRIC'S 1960 NEGOTIATIONS WITH THE IUE (1961); Duvin, *The Duty to Bargain: Law in Search of Policy*, 64 COLUM. L. REV. 248, 288-89 (1964); Note, "Boulwareism": *Legality and Effect*, 76 HARV. L. REV. 807 (1963).

strategy was combined with a communication program aimed at convincing the employees that the company had their best interests at heart and that its offer was a fair one.

The union challenged GE's negotiation strategy as violating the statutory obligation to bargain in good faith. It characterized Boulwareism as a "take-it-or-leave-it" attitude, contrary to the concept of "collective" bargaining. In effect, GE engaged in bargaining with itself—an internal process of analyzing and weighing competing facts and interests—and then presented the results of this internal bargaining to the union to be accepted as the agreement.

The Board held that GE's overall bargaining conduct constituted a violation of the duty to bargain in good faith.⁵² Boulwareism is based on a misconception concerning the nature of the negotiation process. GE saw the process of discussion, offer, and counter-offer as a charade engaged in for the purpose of fooling the employees into believing that the union had extracted concessions from an unwilling employer.⁵³ The process was considered a charade because "the parties have a common (although unstated) understanding of what the final agreement will be,"⁵⁴ and the negotiation process merely expends time and effort to get the parties to that point of final agreement, when they could just as easily begin at that point by stating their common understanding at the start. The firm, final but fair offer, according to GE, constituted such a statement of common understanding.

This characterization of the bargaining process is misconceived for several reasons. First, it is premised on a belief that the actual settlement range is rather limited in scope.⁵⁵ It assumes that one is able to accurately determine another party's priorities and to arrive at a "fair" result from the other party's perspective.⁵⁶

52. General Elec. Co., 150 N.L.R.B. at 285.

53. [GE] disparagingly refers to the "ask-and-bid" or "auction" form of bargaining as a "flea bitten eastern type of cunning and dishonest but pointless haggling." Such bargaining, according to [GE's] articulation, allows a union to *appear* to get more than an employer is willing to give, though that is often not the case, and this only serves, [GE] says, to mislead employees into believing that union officials are useful in ways they are not, thus falsely enhancing the union's prestige while diminishing that of the employer and encouraging employee support of union shows of strength.

Id. at 208.

54. Cross, *Negotiation as a Learning Process*, 21 J. CONF. RESOLUTION 581, 582 (1977).

55. *Id.* at 583.

56. "[I]n real life one cannot recommend an agreement on the grounds that it gives the same utility to both sides, simply because one can never discover what the utility functions are." O. BARTOS, *PROCESS AND OUTCOME OF NEGOTIATIONS* 55 (1974).

Indeed, it assumes, at its basis, that one is actually able to determine another party's interests. However, as the Board emphasized, bargaining is a "shared process in which each party . . . has the right to play an active role."⁵⁷ Listening to the proposals and arguments of the other side can lead a party to change its ideas of what is fair.

Participation in debate often produces changes in a seemingly fixed position either because new facts are brought to light or because the strengths and weaknesses of the several arguments become apparent. Sometimes the parties hit upon some novel compromise of an issue which has been thrashed over and over. Much is gained even by giving each side a better picture of the strength of the other's convictions.⁵⁸

This view of negotiation as a shared process is as valid for nonlabor bargaining as for labor bargaining. Boulwareism is as inappropriate for negotiation in general as for collective bargaining in particular.

An initial problem with using Boulwareism as a negotiation strategy is credibility. Because most negotiators tend to adopt the above-expressed view of negotiation as a shared process, they see a first offer as being "negotiable" regardless of whether the negotiator says it is a final offer.⁵⁹ The offer will accordingly be rejected under the assumption that another offer will be made. When a second offer, however, is not forthcoming, the negotiation process is prematurely terminated.

A second problem created by this strategy is the reaction that it produces in the other party if it is believed. It deprives the other party of an opportunity to participate in shaping the agreement reached, and is seen, in effect, as the unilateral imposition of terms, thus creating a "victory" for its proponent and robbing the accepting party of prestige.⁶⁰ The strategy is also viewed as arrogant, in that the proponent implies knowledge of what the other side wants and the ability to determine what is fair for both sides.⁶¹

Because of the effect of this strategy on the other party, presenting a take-it-or-leave-it offer may result in failure to reach an

57. *General Elec. Co.*, 150 N.L.R.B. at 194 (footnote omitted); see also Note, *supra* note 51, at 813.

58. Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1412 (1958).

59. Hartje, *Lawyer's Skills in Negotiations: Justice in Unseen Hands*, 1984 Mo. J. DISPUTE RESOLUTION 119, 165, 176 n.200.

60. C. CRAVER, *supra* note 1, at 127; C. STEVENS, *supra* note 3, at 35.

61. C. CRAVER, *supra* note 1, at 127. See also P. GULLIVER, *supra* note 1, at 138-39 (suggesting that it is unrealistic to think one can know the opponent's preferences and strengths).

agreement even when the offer is objectively "fair" to the other side.⁶² A study investigating reciprocity in bargaining situations found that participants agreed to a small request when preceded by a large request more often than when only the small request ("fair" offer) was made.⁶³

In any negotiation situation, the expectations of the bargainers for participation in a shared process should be recognized. The negotiators must be prepared to engage in a process of discussion, offer, and concession-making with open minds and flexible positions.

D. Withdrawing Proposals

The process of negotiation suggests that the parties are working together to reach a mutually acceptable point of agreement. The progress toward this goal can be stymied where one of the parties withdraws from a previously accepted proposal. In such circumstances the forward momentum has been stopped and the resulting retrogression can lead to a breakdown in the negotiation process. Thus, withdrawing previously accepted proposals runs counter to the negotiation process. The Board views such behavior as indicative of a lack of good-faith intent to negotiate.⁶⁴ When a negotiator "repudiates understandings already arrived at, abruptly changes its positions without any announced reason, or interposes new demands not raised earlier, this conduct will destroy not only amicability at the bargaining table but also the premises on which bargaining has progressed, and will protract the negotiations and delay settlement."⁶⁵

The tentative agreements made during the course of a negotiation may not be legally binding commitments under contract law.⁶⁶

62. C. CRAVER, *supra* note 1, at 127.

63. Hamner & Yukl, *The Effectiveness of Different Offer Strategies in Bargaining*, in *NEGOTIATIONS: SOCIAL-PSYCHOLOGICAL PERSPECTIVES* 155 (D. Druckman ed. 1977).

64. See, e.g., *NLRB v. Midvalley Steel Fabricators*, 621 F.2d 49, 51-52 (2d Cir. 1980); *NLRB v. Ramona's Mexican Food Prods.*, 531 F.2d 390, 394 (9th Cir. 1975); *American Seating Co. v. NLRB*, 424 F.2d 106, 108 (5th Cir. 1970); *NLRB v. International Furniture Co.*, 212 F.2d 431, 433 (5th Cir. 1954); *United Bhd. of Carpenters, Local 1780*, 244 N.L.R.B. 277, 281 (1979); *Crane Co.*, 244 N.L.R.B. 103, 113-14 (1979); *Brownsboro Hills Nursing Home*, 244 N.L.R.B. 269, 272 (1979); *Carolina Paper Bd. Corp.*, 183 N.L.R.B. 544, 550 (1970); *Marley Co.*, 150 N.L.R.B. 919, 921-22 (1965); *Newberry Mills*, 141 N.L.R.B. 1167, 1168 (1963); *National Shoes*, 103 N.L.R.B. 438, 449 (1953), *enforcing* 208 F.2d 688 (2d Cir. 1953).

65. R. GORMAN, *BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING* 408 (1976).

66. See *RESTATEMENT (SECOND) OF CONTRACTS* § 26 (1981). Often, when parties engage in multi-issue negotiations, they set the ground rule that agreements made on separate issues during the course of negotiations are tentative only, subject to the completion of the entire negotiable package.

These agreements, however, are ethically binding on negotiators as the parties expect that such agreements will not be repudiated except under extraordinary or changed circumstances.⁶⁷ As one commentator notes, "There is a norm or custom against revoking concessions. Breach of the custom . . . is, at best, awkward and, at worst, can cause a breakdown in negotiations."⁶⁸

E. Information Disclosure

The importance of information in the negotiation process was recognized by the Board from the NLRA's inception. "Interchange of ideas, communication of facts peculiarly within the knowledge of either party, personal persuasion and the opportunity to modify demands in accordance with the total situation thus revealed at the conference is of the essence of the bargaining process."⁶⁹ Negotiation is, at its simplest, a learning process premised on an exchange of information. The parties exchange facts, interpretations of the facts, interests, importance of the interests, arguments, threats, promises, and offers. Based on the information thus received, the parties assess their own and the other's strengths, weaknesses, preferences, and perceptions. This assessment then leads the parties to modify their own positions, accept the other party's offers, and eventually results in agreement, or in the realization that agreement is not possible.⁷⁰

An exchange of information is an essential component of the negotiation process, creating the conditions necessary for an informed decision to either accept or reject a party's proposals.⁷¹ Thus, while the NLRA does not explicitly impose a duty to disclose

67. See *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1082-83 (1st Cir. 1981); *NLRB v. Randle-Eastern Ambulance Serv.*, 584 F.2d 720, 726-27 (5th Cir. 1978); *San Antonio Mach. & Supply Corp.*, 147 N.L.R.B. 1112, 1116-17 (1964), *enforcing* 363 F.2d 633 (5th Cir. 1966).

68. Schoenfield, *Strategies and Techniques for Successful Negotiations*, 69 A.B.A.J. 1226, 1227 (1983).

69. *S.L. Allen & Co.*, 1 N.L.R.B. 714, 728 (1936), *enforced as modified*, 2 L.R.R.M. (BNA) 780 (3d Cir. 1938).

70. See P. GULLIVER, *supra* note 1, at 5-7, 79-80.

71. This development [of the duty to disclose information] has been in part a response to the realization that certain information acts as the lubricant needed to keep the collective bargaining machinery running smoothly. It recognizes that the parties can negotiate and administer a collective bargaining agreement only when they have available the information necessary to make informed, intelligent decisions.

Bartosic & Hartley, *The Employer's Duty to Supply Information to the Union—A Study of the Interplay of Administrative and Judicial Rationalization*, 58 CORNELL L. REV. 23, 23 (1972).

information, the Board and the courts have interpreted the requirement of good faith as embodying the obligation to furnish information necessary and relevant to the negotiation.⁷² The chances for a successful negotiation are enhanced when the process is fueled by informed discussion rather than by ignorance and deceit.⁷³

The disclosure of information is viewed as so important to the negotiation process that the Board and courts have imposed a duty to disclose unrelated to the presence or absence of subjective good faith. "Merely meeting and conferring without a prior exchange of requested data, where such is relevant, does not facilitate *effective* collective bargaining and, therefore, . . . a refusal to furnish data is an unfair labor practice notwithstanding the good faith of the employer in rejecting the request."⁷⁴ Disclosing information is necessary so that the negotiator can intelligently discuss the issues raised in negotiation,⁷⁵ consider the other side's arguments,⁷⁶ develop reasonable bargaining proposals,⁷⁷ and determine when to make concessions.⁷⁸

Access to information is not limited to those facts necessary to evaluate the other side's proposals, but also includes facts that would be helpful in formulating and modifying the negotiator's own proposals.⁷⁹ For example, where the union is interested in proposing the establishment of a plant safety program, it is entitled to information regarding safety hazards in the plant and the

72. *E.g.*, *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

Good faith bargaining necessarily requires that claims made by either bargainer should be honest claims. . . . And it would certainly not be farfetched . . . to reach the conclusion that bargaining lacks good faith when an employer mechanically repeats a claim of inability to pay without making the slightest effort to substantiate the claim.

Id. at 152-53. *See also* *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 314 (1979); *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967).

73. Duvin, *The Duty to Bargain: Law in Search of Policy*, 64 COLUM. L. REV. 248, 280-83 (1964).

74. *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61, 68 (3d Cir. 1965) (emphasis in original).

75. *See, e.g.*, *Aluminum Ore Co.*, 39 N.L.R.B. 1286, 1297 (1942), *modified*, 131 F.2d 485 (7th Cir. 1942).

76. *See, e.g.*, *Westinghouse Elec. Supply Co.*, 96 N.L.R.B. 407, 409 (1951), *rev'd on other grounds*, 196 F.2d 1012 (3d Cir. 1952).

77. *See, e.g.*, *Litton Microwave Cooking Prods. Div., Litton Sys.*, 283 N.L.R.B. 973 (1987), *rev'd on other grounds*, 868 F.2d 854 (6th Cir. 1989).

78. *Rototype Div., Pertec Computer Corp.*, 284 N.L.R.B. No. 88 (June 30, 1987).

79. "[T]he Union sought additional relevant information with which it could determine the meaning of the information already provided and develop reasonable bargaining proposals." *Litton Microwave Cooking Prods. Div., Litton Sys.*, at 975.

identities of chemicals to which the employees are exposed.⁸⁰

The Board and the courts have developed guidelines for determining when a negotiator is required to disclose information.⁸¹ The duty to disclose is activated only upon a request for information by the other negotiator.⁸² The information requested must be necessary and relevant to the collective bargaining process.⁸³ In certain limited circumstances, a negotiator may be able to justify a refusal to provide requested information if a legitimate and substantial need for confidentiality is established,⁸⁴ or if the request for information was made in bad faith.⁸⁵

The NLRA speaks to the disclosure of information based on facts, not intent. Thus, a negotiator's statement that "I do not want to pay my employees more money" is based on nondisclosable intent,⁸⁶ whereas the statement "I cannot afford to pay my employees more money" is based on verifiable fact subject to disclosure.⁸⁷

This legal emphasis on information as a key ingredient in the negotiation process finds ample support in the theoretical literature on negotiation. The exchange of information is the motor which drives the negotiation process. Information is needed to formulate one's own goals and strategies as well as to understand the other party's goals. The broader and better the information base, the more effectively a party can bargain.⁸⁸

80. See *Oil, Chemical & Atomic Workers Local 6-418 v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983).

81. For a complete discussion of the duty to furnish information within the context of the NLRA, see J. O'REILLY, *UNIONS' RIGHTS TO COMPANY INFORMATION* (rev. ed. 1987).

82. See, e.g., *A.H. Belo Corp. v. NLRB*, 411 F.2d 959, 971 (5th Cir. 1969), *cert. denied*, 396 U.S. 1007 (1970); *Westinghouse Elec. Supply Co. v. NLRB*, 196 F.2d 1012, 1014 (3d Cir. 1952); *United States Smelting, Refining & Mining Co.*, 179 N.L.R.B. 1018, 1026 (1969), *aff'd per curiam*, 442 F.2d 893 (D.C. Cir. 1971); *Boston Herald-Traveler Corp.*, 102 N.L.R.B. 627, 628 (1953), *enforced*, 210 F.2d 134 (1st Cir. 1954).

83. See, e.g., *International Tel. & Tel. Corp. v. NLRB*, 382 F.2d 366, 371-72 (3d Cir. 1967), *cert. denied*, 389 U.S. 1039 (1968); *NLRB v. Item Co.*, 220 F.2d 956, 958 (5th Cir. 1955), *cert. denied*, 350 U.S. 836 (1955); *Transport of N.J.*, 233 N.L.R.B. 694 (1977); *Ellsworth Sheet Metal*, 224 N.L.R.B. 1506, 1509 (1976).

84. See, e.g., *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 315 (1979).

85. See, e.g., *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1092-96 (5th Cir. 1981); *Shell Oil Co. v. NLRB*, 457 F.2d 615, 619 (9th Cir. 1972); *Webster Outdoor Advertising*, 170 N.L.R.B. 1395, 1396 (1968).

86. *Empire Terminal Warehouse Co.*, 151 N.L.R.B. 1359, 1360 (1965), *enforced*, 355 F.2d 842 (D.C. Cir. 1966).

87. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152-53 (1956). See also J. O'REILLY, *supra* note 81, at 50-51.

88. See C. CRAVER, *supra* note 1, at 55-67; R. FISHER & W. URY, *supra* note 1, at 41-57; P. GULLIVER, *supra* note 1, at 81-120; D. PRUITT, *supra* note 1, at 170-75; MacDougall, *Introduction to Negotiation Theory*, 58 L. INST. J. 1434, 1434-35 (1984).

The very importance of information to effective negotiation, however, makes it a hostage to manipulation and concealment. Information is used by both parties to formulate goals and strategies as well as to evaluate their respective positions. A negotiator can use the information regarding the other party's goals and positions to devise effective threats or positional commitments and thereby force the other party to agree to a minimally acceptable agreement.⁸⁹

The bargainer's need for information and reluctance to disclose information (because it could be misused) creates a dilemma for the negotiator:

It is this tension between *information needs* and *information restraints* that constitutes the central motivational force for negotiators' behavior As Ornati has aptly put it, "In all its aspects and at all periods, negotiating is the process of 'finding out.' " How information is exchanged in these negotiations and why this exchange takes the complex and tortured form it does is explained by the shared conflict between the need for information and restraints against providing it.⁹⁰

Thus, the negotiator cannot be completely open and honest because of the risk of exploitation, yet a complete refusal to provide information risks creating so much distrust in the other party that a breakdown occurs in the negotiation process.⁹¹

The NLRA deals with this information dilemma by imposing a duty to disclose information relating to objective facts concerning those subjects under discussion, while allowing negotiators to conceal information relating to subjective intent and interests. As noted by Zartman and Berman, concealment or distortion of information can occur on three levels:

(1) reality of information ("We do have a nuclear capability," when we really do not quite); (2) hierarchy of values ("We prefer this island to that one but we will let you have this one if you give us enough

89. D. PRUITT, *supra* note 1, at 92-93; Kelley, *supra* note 41, at 57-58. For example, in a negotiation where an amount of money is the only issue to be agreed upon (such as bargaining over the price of an antique in a bazaar), the buyer might be willing to pay as much as \$2000. The buyer's satisfaction with the purchase, however, would increase proportionately to the amount paid under \$2000. The seller, on the other hand, is willing to sell the antique for \$1500, but like the buyer, would also proportionately increase satisfaction by obtaining more money. If the buyer discovers that the seller will accept \$1500, the buyer can use this information to her advantage and to the seller's disadvantage by stating that \$1500 is the most she will pay (making a positional commitment) and beginning to walk away (threatening to break off negotiations). See G. BELLOW & B. MOULTON, *supra* note 1, at 32-33.

90. Kelley, *supra* note 41, at 58 (emphasis in original, citation omitted).

91. Rubin, *Negotiation: An Introduction to Some Issues and Themes*, 27 AM. BEHAV. SCIENTIST 135, 137 (1983); P. GULLIVER, *supra* note 1, at 85.

compensation," when we really don't care about this one but can't live without that one); (3) degree of commitment ("We will bomb if you don't agree but will give aid if you do," when we have no intention either of bombing or of giving aid).⁹²

The NLRA ensures that information is exchanged and negotiation can continue at least on the reality of information level.

F. Conclusion

Over the course of fifty years, legal principles have been developed requiring certain types of bargaining behavior from parties negotiating in good faith. These principles, established through the legal system under federal labor law, fit within the theoretical structure of negotiation as developed by social scientists. Labor law requires conduct of good-faith bargaining, fundamental for all negotiation.

Adherence to these procedural guidelines has been proven not only a theoretically sound practice for effective bargaining, but also a practically effective means for negotiation. Labor and management negotiators work within these strictures, arriving at mutually agreeable collective bargaining contracts. There is no evidence to suggest that the utilization of these procedural guidelines by negotiators involved in other types of bargaining would not similarly lead to desirable results.

Communication, trust, and information are essential elements of any negotiation.⁹³ The procedures developed under the NLRA enhance communication through requiring in-person meetings of sufficient length with negotiators of sufficient authority to discuss and agree, create trust by requiring good faith, open-mindedness and compliance with commitments, and facilitate the exchange of information. Observance of the procedural rules by all negotiators will promote effective and efficient negotiation.

92. See I. ZARTMAN & M. BERMAN, *supra* note 1, at 153.

93. Communication is at the heart of the negotiation process. While planning, prework, evaluating the bargaining situation, and strategizing are all key elements to the diagnosis and understanding of negotiation, communication is the central instrumental process. Unless negotiators deal with one another strictly by trading bids and offers on slips of paper, communication processes, both verbal and nonverbal, are critical to the achievement of negotiating goals.

R. LEWICKI & J. LITTERER, *supra* note 1, at 157. See also I. ZARTMAN & M. BERMAN, *supra* note 1 ("Some of the concern about personality and attitude traits comes down to the matter of trust, one of the cardinal underlying characteristics of a fruitful negotiation." *Id.* at 27.); P. GULLIVER, *supra* note 1 ("In essence—and this is to be emphasized—the process of negotiation is one of information exchange and of consequent learning and adjustment by the parties." *Id.* at 81.).

